

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**PENNSYLVANIA NATIONAL
MUTUAL INSURANCE
COMPANY,**

Plaintiff,

v.

**HANNA STEEL CORPORATION,
et al.,**

Defendants.

**CIVIL ACTION NO.: CV-08-J-
0635-S**

JURY TRIAL DEMANDED

**MOTION FOR LEAVE TO SUPPLEMENT HANNA STEEL’S RESPONSE
TO AMERICAN MANUFACTURERS MUTUAL INSURANCE
COMPANY’S JOINDER IN FIREMAN’S FUND INSURANCE
COMPANY’S MOTION FOR SUMMARY JUDGMENT**

Hanna Steel Corporation (“Hanna Steel”) respectfully moves for leave to supplement its Response to American Manufacturers Mutual Insurance Company’s (“AMMIC”) Joinder in Fireman’s Fund Insurance Company’s (“FFIC”) Motion for Summary Judgment, as follows:

1. In support of its reply, AMMIC, a member of the Kemper group of insurers, raised for the first time the argument that the “absolute” pollution exclusion in its Policy applies to the products completed operations hazard.

Docket No. 90 at p.4.

2. In direct contrast to AMMIC's argument in its reply brief, at least one insurance coverage treatise indicates that the Kemper group's own underwriting manual included its admission that the pollution exclusion in AMMIC's policy did not apply to the products completed operations hazard, as follows:

The insurance industry has admitted, on numerous occasions, that the 'absolute' pollution exclusion does not preclude insurance coverage for damages arising out of 'products,' 'completed operations,' and 'certain off-premises discharges of pollutants.' [fn] 643 **For example, in its General Liability & Commercial Umbrella Underwriting Manual, the Kemper Group has stated that the 'absolute' pollution exclusion does not apply to 'products/completed operations hazards.'** [fn] 644

[fn] 643 E.g., Insurance Services Office, Inc., Explanatory Memorandum, Pollution Exclusion Endorsement (1984) (on file with authors); *ISO Makes the Case for the CGL Insurance Services, Inc. responds to concerns raised at The Joint Forum on ISO's Proposed CGL Policy Forms*, Chicago, Illinois at 19 (Aug. 1985).

[fn] 644 Kemper Group, *General Liability & Commercial Umbrella Underwriting Manual* § IV, ¶ 7(a), at 22.09 (on file with authors).

Eugene R. Anderson, et al., *Insurance Coverage Litigation*, 2d ed. (Aspen Law & Business 2000) (ISBN: 073551173X 9780735511736, OCLC: 42813025) (Emphasis added) ("Anderson treatise").

3. This Motion and proposed supplement are offered prior to the close of the submission schedule. The submission schedule closes today, October 10, 2008, with the expiration of FFIC's deadline for filing a reply.

4. A copy of the Supplement is attached hereto as Exhibit A.

WHEREFORE, Hanna Steel moves that this Court grant it leave to supplement its Response to AMMIC's Joinder in FFIC's Motion for Summary Judgment in the form of its proposed Supplement to Hanna Steel's Response to AMMIC's Joinder in FFIC's Motion for Summary Judgment, a copy of which is attached to this motion as Exhibit A.

Respectfully submitted,

/s/ David K Pharr

David K. Pharr
One of the Attorneys for
Hanna Steel Corporation

OF COUNSEL:

David Hymer
Joel M. Kuehnert
Sarah L. Nichols
Bradley Arant Rose & White LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
Telephone: (205) 521-8000
Facsimile: (205) 521-8800
dhymer@bradleyarant.com
jkuehnert@bradleyarant.com
snichols@bradleyarant.com

David K. Pharr
Bradley Arant Rose & White LLP
188 E. Capitol Street, Suite 450
Jackson, MS 39201
Telephone: (601) 592-9924
Facsimile: (601) 592-1424
dpharr@bradleyarant.com

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2008, a copy of the foregoing was served upon counsel of record for all parties to this proceeding by electronic means or by placing a copy thereof in the United States Mail, first-class postage prepaid and properly addressed as follows:

Vernon L. Wells II, Esq.
Walston, Wells & Birshall, LLP
1819 5th Avenue North
Suite 1100
P.O. Box 830642
Birmingham, AL 35283-0642

R. Larry Bradford, Esq.
Jereme C. Logan, Esq.
Bradford, & Sears, P.C.
2020 Canyon Road
Suite 100
Birmingham, AL 35216

J. Gusty Yearout, Esq.
Yearout & Traylor PC
800 Shades Creek Parkway, Suite 500
Birmingham, AL 35209

Lloyd W. Gathings, II
Gathings Law
2100 3rd Avenue North
Suite 900
Birmingham, AL 35203

Cathryn Blue Derian
Donald W. McCormick, III
McCormick & Associates PC
1829 E. Franklin Street, Suite 600
Chapel Hill, NC 27514

Gary D. Centola
Rivkin Radler LLP
926 RexCorp Plaza
Uniondale, NY 11556

Lynn S. Darty
Sharon Donaldson Stuart
Christian & Small LLP
505 North 20th Street
Birmingham, AL 35203

/s/David K. Pharr
Of Counsel

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

PENNSYLVANIA NATIONAL)	
MUTUAL INSURANCE)	
COMPANY,)	
)	
Plaintiff,)	
)	CIVIL ACTION NO.: CV-08-J-
v.)	0635-S
)	
HANNA STEEL CORPORATION,)	JURY TRIAL DEMANDED
et al.,)	
)	
Defendants.)	
)	

**SUPPLEMENT TO HANNA STEEL’S RESPONSE TO AMERICAN
MANUFACTURERS MUTUAL INSURANCE COMPANY’S
JOINDER IN FIREMAN’S FUND INSURANCE COMPANY’S
MOTION FOR SUMMARY JUDGMENT**

Hanna Steel Corporation (“Hanna Steel”) respectfully submits this supplement in support of its Response to American Manufacturers Mutual Insurance Company’s (“AMMIC”) Joinder in Fireman’s Fund Insurance Company’s (“FFIC”) Motion for Summary Judgment, as follows:

In support of its reply, AMMIC, a member of the Kemper group of insurers, argued that “there is no question under the clear language of the policy that the [absolute] pollution exclusion applies to all bodily injury and property damage

claims, including those within the products-completed operations hazard,” and further that, “Any contrary suggestion is simply wrong.” Docket No. 90 at p. 5.

At least one insurance coverage treatise indicates that Kemper has admitted just the opposite, as follows:

The insurance industry has admitted, on numerous occasions, that the ‘absolute’ pollution exclusion does not preclude insurance coverage for damages arising out of ‘products,’ ‘completed operations,’ and ‘certain off-premises discharges of pollutants.’ [fn] 643 **For example, in its General Liability & Commercial Umbrella Underwriting Manual, the Kemper Group has stated that the ‘absolute’ pollution exclusion does not apply to ‘products/completed operations hazards.’** [fn] 644

[fn] 643 E.g., Insurance Services Office, Inc., Explanatory Memorandum, Pollution Exclusion Endorsement (1984) (on file with authors); *ISO Makes the Case for the CGL Insurance Services, Inc. responds to concerns raised at The Joint Forum on ISO’s Proposed CGL Policy Forms*, Chicago, Illinois at 19 (Aug. 1985).

[fn] 644 Kemper Group, *General Liability & Commercial Umbrella Underwriting Manual* § IV, ¶ 7(a), at 22.09 (on file with authors).

Eugene R. Anderson, et al., *Insurance Coverage Litigation*, 2d ed. (Aspen Law & Business 2000) (ISBN: 073551173X 9780735511736, OCLC: 42813025) (Emphasis added) (“Anderson treatise”).

The language of the pollution exclusion clearly does not apply to the product-related claims in the Underlying Lawsuits. *See West American Ins. v. Tufco Flooring*, 409 S.E.2d 692 (N.C.App. 1991), *overruled on other grounds by Gaston County Dyeing v. Northfield Ins.*, 524 S.E.2d 558, 565 (N.C. 2000)(overruling a separate holding related to the coverage trigger method employed under North Carolina law). Alternatively, an ambiguity is created by the presence of products-completed operations coverage and a pollution exclusion that is limited to claims arising from pollution on or from the insured's premises or elsewhere in the context of waste handling. That ambiguity should be resolved in favor of Hanna Steel. Bibb Allen, *Alabama Liability Insurance Handbook* §§ 3-6(a) through (c) (*citing Burnham Shoes, Inc. v. West Am Ins. Co.*, 504 So. 2d 238 (Ala. 1987)). If the Court determines that extrinsic evidence should be considered in resolving the ambiguity, the above-quoted excerpt from the Anderson treatise demonstrates the need for discovery prior to summary judgment. *Id.* at § 3-6 (d).

Respectfully submitted this ____ day of October, 2008, by Hanna Steel Corporation.

Respectfully submitted,

Hanna Steel Corporation

OF COUNSEL:

David Hymer
Joel M. Kuehnert
Sarah L. Nichols
Bradley Arant Rose & White LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
Telephone: (205) 521-8000
Facsimile: (205) 521-8800
dhymer@bradleyarant.com
jkuehnert@bradleyarant.com
snichols@bradleyarant.com

David K. Pharr
Bradley Arant Rose & White LLP
188 E. Capitol Street, Suite 450
Jackson, MS 39201
Telephone: (601) 592-9924
Facsimile: (601) 592-1424
dpharr@bradleyarant.com